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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 249

H. B. McFARLING, JOHN G. SCOTT, and MOUNTAIN VALLEY SALES CO., a Corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

EDWARD L. WRIGHT,
1025 Pyramid Building,
Little Rock, Arkansas,
ROBERT F. SCHLAFLY,
314 North Broadway,
St. Louis, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, H. B. McFarling, John G. Scott and Mountain Valley Sales Co., a corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 28, 1958, in the mandamus proceedings entitled "United States of America, Petitioner, vs. The Honorable John E. Miller, Judge of the United States District Court for the Western District, Arkansas, Respondent, Mountain Valley Sales Co., a corporation, H. B. McFarling and John G. Scott, Interveners", being case No. 15,972 in that court.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit, upon which its judgment of May 28, 1958 was based, has not been reported at the date of this petition but a copy is set out in the appendix hereto (Appendix A, p. 15).

The opinion and judgment of May 28, 1958 relate to the form of judgment to be entered by the District Court for the Western District of Arkansas in a libel action under the Federal Food, Drug and Cosmetic Act. On appeal, after trial of the libel action, the Court of Appeals reversed the judgment against the government and remanded to the district court for entry of a new judgment. The opinion of the Court of Appeals deciding that appeal is reported at 247 F. 2d 743, and is set out in the appendix hereto (Appendix C, p. 21).

The opinion of the District Court for the Western District of Arkansas in the libel action is reported at 143 F. Supp. 219, and is set out in the record (R. item 12, p. 334).

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed is dated May 28, 1958 and was entered the same date (R. item 8). A copy is set out in the appendix hereto (Appendix B, p. 19). It did not become final until June 27, 1958, when the Court of Appeals entered an order denying rehearing (R. item 10).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

In a libel for condemnation under Section 304 of the Federal Food, Drug and Cosmetic Act, the government charged, in separate paragraphs, misbrandings of the seized water by false representations, in violation of Sections 403 (a) and 502 (a), and, also, a misbranding by failure of the label to show certain ingredient information, in violation of the regulations under Section 403 (j) of the Act. There was a jury verdict against the government and in favor of the claimants on all issues. The government appealed on the single ground that the district court erred in denying its motion for directed verdict on the Section 403 (j) charge. It did not challenge the verdict with respect to the issue of false representations. The Court of Appeals held that Section 403 (j) was violated, as a matter of law, and reversed the judgment on that ground, ordering a decree of condemnation. On remand the District Court entered a judgment of condemnation for violation of Section 403 (j) of the Act, as directed.

In addition, the District Court judgment dismissed with prejudice the charges of false representations under Sections 403 (a) and 502 (a), in accordance with the jury verdict on those issues, and limited the statutory costs to those referable to the single misbranding adjudged. On the government's petition for mandamus the Court of Appeals ordered stricken from the District Court's judgment the provisions for dismissal of the false representation charges and the limitation of costs.

The questions presented are:

1. Whether, under the Fifth and Seventh Amendments to the Constitution, and under the jury trial provision of Section 304 (b) of the Act, a judgment of condemnation for violation of Section 403 (j) can deprive claimants of a jury verdict in their favor on

separate charges of violations of Section 403 (a) and 502 (a) of the Act, when those issues were submitted to the jury at the request of the government?

2. Does the reversal of the judgment, for failure to direct a verdict for the government on one charge, eliminate the verdict in favor of the claimants on the other, separate charges?

3. Whether, under the Fifth and Seventh Amendments to the Constitution, upon entry of a judgment of condemnation for violation of one section of the Act, the issues as to alleged violations of other sections "disappeared from the case," even though such issues had been determined by a jury at the request of the government?

4. Does Section 304 (e) of the Act deprive the District Court of discretion in determining the extent of the statutory costs to be awarded against the claimants after a decree of condemnation?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The constitutional provisions involved are Amendments V and VII to the Constitution of the United States. They are set out in the appendix (Appendix F, p. 40).

The statute is the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040—particularly sections 304 (a), 304 (b), 304 (d), 304 (e), 403 (a), 403 (j) and 502 (a) of the Act [21 U. S. C. 334 (a), 334 (b), 334 (d), 334 (e), 343 (a), 343 (j) and 352 (a)]. The pertinent parts are set out in the appendix (Appendix F, pp. 40-42).

STATEMENT.

This matter began on August 19, 1953, when the United States filed in the District Court at Memphis, Tennessee, a libel for condemnation under 21 U. S. C. 334 and seized a stock of Mountain Valley Water at Memphis pursuant to the libel (R. Item 12, p. 1). The petitioners in this Court are the claimants of the seized property in the District Court.

Paragraphs 3 and 5 of the libel alleged that the water under seizure was misbranded because its labeling was false and misleading in violation of Section 502 (a) and 403 (a) of the Act, respectively. Paragraph 4 of the libel alleged a misbranding in violation of Section 403 (j) because the label did not bear certain information specified by applicable regulations (R. Item 12, pp. 4-5). Claimants denied all the allegations of misbranding, and requested a jury trial (R. Item 12, p. 30). The case was transferred to the Western District of Arkansas—(see 226 F. 2d 238)—and was tried before a jury.

The trial began May 21, 1956 and concluded on June 2, 1956 (R. Item 12, p. 335). The trial evidence related almost entirely to the question of the truth or falsity of the representations made for the water, as tendered by paragraphs 3 and 5 of the libel. Both sides introduced extensive evidence on that basic issue, which dominated the entire litigation (R. Item 12, pp. I-V, 348-349; Item 13, pp. I-II; Item 14, Item 15, p. 23).

At the close of the evidence, the government filed a motion for directed verdict for violation of Section 403 (j), and on the ground that one false representation had been made in the labeling in violation of Section 502 (a) (R. Item 12, pp. 277-280, 282-283); the motion was overruled (R. Item 12, p. 279). The issue of false representations in violation of Section 403 (a) and 502 (a) was submitted to the

jury for decision with the consent of the parties and on instructions requested by the government (R. Item 12, pp. 300, 301-302, 314-319, 321). There was a general verdict in favor of the claimants and against the government on all issues (R. Item 12, p. 330).

The government moved for judgment in accordance with its prior motion for directed verdict (R. Item 12, pp. 332-333). The opinion of the district court denying the motion is set out in the Record, Item 12, pp. 334-350. The motion for judgment n. o. v. was the only after-trial motion filed by the government; there was no motion for new trial.

On appeal, the only question presented to the Court of Appeals for review was whether the trial court erred in refusing to direct a verdict in favor of the government for a violation of Section 403 (j), as charged in paragraph 4 of the libel. The government did not challenge in the Court of Appeals the verdict against it on the issue of false representations under Sections 403 (a) and 502 (a) (R. item 15, pp. 5, 9).

In its opinion and judgment of August 6, 1957 (Appendix C, D, pp. 21-36), the Court of Appeals held that the trial court erred in denying the government's motion for a directed verdict on the Section 403 (j) charge; the Court reversed the judgment and remanded the case with directions to enter a judgment of condemnation. After remand, on December 19, 1957 the District Court entered a judgment of condemnation for violation of Section 403 (j), and included the following paragraph over the objection of the government:

> "2. That pursuant to the verdict herein returned on June 6, 1956, with respect to the charges contained in paragraphs 3 and 5 of said libel of information, alleging a misbranding of said water within the meaning of 21 U. S. C. 352 (a) and 21 U. S. C. 343 (a) because of false and misleading representations, which issues were submitted to the jury by consent of the

parties, and in accordance with said jury verdict in favor of the claimants on all said issues, the charges contained in Paragraphs 3 and 5 of said libel of information are hereby dismissed with prejudice to the libelant."

Also, in providing for the recovery by the government of statutory costs and expenses in paragraph 5 of the judgment, the District Court limited such items to those "which are directly referable to the misbranding adjudged herein." The judgment is set out in the appendix (Appendix E, p. 37) and in the Record, Item 1, Exhibit D.

On March 11, 1958 the government filed a petition in the Court of Appeals for a writ of mandamus to compel the district judge to amend the judgment of December 19, 1957, by eliminating all of paragraph 2 and by striking out of paragraph 5 the provision limiting costs to the misbranding which was adjudged. The petition for mandamus and supporting exhibits are set out in the Record, Item 1.

The district judge filed a response to the order to show cause and a brief (R. Items 3, 6). The claimants in the libel action in the District Court (petitioners in this Court), moved to intervene as parties in the mandamus proceeding (R. Item 4) and were permitted to do so by order of the Court of Appeals (R. Item 5). While the mandamus proceeding was pending in the Court of Appeals, the claimants filed separate motions in the District Court, under the authority of 21 U. S. C. 334 (d), asking for the release of the seized articles and the return of certain of the pamphlets on the ground that there had been no adjudication that the pamphlets were false or misleading in any particular, and that the articles could readily be brought into compliance with Section 403 (j). These motions are found in the record, Item 3, as Exhibits 4 and 5 to Judge Miller's response to the order to show cause. The District Court has deferred action on these motions until disposition of the mandamus proceeding.

The Court of Appeals, in its opinion and judgment of May 28, 1958, directed the District Court to amend its judgment "by eliminating paragraph 2 and striking out in paragraph 5 the words, 'which are directly referable to the misbranding adjudged herein'" (Appendix A, B, pp. 15-20). The Court of Appeals stated in its opinion

> "... that every element and issue which inhered in the verdict upon which the judgment appealed from in the libel proceeding was based disappeared from the case when this Court reversed that judgment and directed the entry of a judgment in favor of the Government on the ground that, under the evidence and as a matter of law, it was entitled to a judgment of condemnation at the close of the evidence" (Appendix A, p. 17).

On June 17, 1958, a petition for rehearing was filed by the respondent judge and the interveners (R. Item 9), which was denied on June 27, 1958 (R. Item 10). Thereafter, the Court of Appeals entered an order staying the transmittal of its judgment of May 28, 1958, to the District Court for thirty days after July 7, 1958, pending the filing in this Court of a petition for writ of certiorari within that time (R. Item 11).

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it erroneously interprets the Federal Food, Drug and Cosmetic Act of 1938 in two important respects:

1. By holding that a decree of condemnation for violation of Section 403 (j) nullifies a verdict in favor of the claimants on separate charges under Section 403 (a) and 502 (a), and eliminates those issues from the case. In doing so, the decision below deprives the claimants of their right to the jury verdict in their favor on separate fact issues, which had been submitted to a jury for determination at the request of the government, and which issues

were not preserved for review by the Court on appeal. The decision conflicts with the due process provisions of the Fifth Amendment, with the Seventh Amendment, with the jury trial provision of Section 304 (b) and with a recent decision of the District of Columbia Circuit. The matter involves an important question of federal law, which has not been settled by this Court, but should be, because it is implicit in all libels* involving multiple charges, instituted by the government in the enforcement of the Act.

2. By depriving the district court of its inherent power to exercise discretion on the allowance of costs under the Act, contrary to the intent of the Congress and in conflict with a decision of the Tenth Circuit. This question, whether Section 304 (a) of the Act removes all discretion from the district courts in the awarding of costs in such proceedings, has not been settled by this Court, but should be, because it involves the important principle of judicial control over costs, and because the removal of that traditional control will result in preventing many owners from exercising their right to defend against the libels.

1. Nullification of Jury Issues by Court of Appeals.

The Court below held that upon a decree of condemnation for the violation of one section of the Act, the issues as to alleged violation of other sections "disappeared from the case . . ." (Appendix A, p. 17). It said these other issues disappeared even though they had been submitted to the jury on instructions requested by the government, and although the verdict against the government on such issues had not been challenged on appeal.

In the case of **Buticaps, Inc., v. United States,** Dist. of Col. Cir., 252 F. 2d 654, the District of Columbia Circuit reached the opposite conclusion. It held that a decree of condemnation, after claimant had admitted two charges

*809 libel actions were instituted under this Act in 1957. See 1957 Annual Report of Food and Drug Administration, Table 2.

of misbranding in violation of the Act, did **not** deprive the claimant of the right to an adjudication of a third charge. The District of Columbia Circuit properly held that the claimant "is entitled to judicial due process" on the remaining charge (252 F. 2d 634 at 636).

Thus, in **Buticaps**, the District of Columbia Circuit holds that one charge of misbranding does not disappear upon the entry of a decree of condemnation of the articles for two other misbrandings charged in the libel. That court recognizes that, under the Act and under the constitutional requirement of due process of law, the claimant has the right to **get** an adjudication of the remaining charge, despite the judgment finding other violations. On the other hand, in the instant case, the Court below denied the claimants the right to **keep** an adjudication by jury verdict of no misbranding under the two separate charges of false representations. This denial was not because of any error in the verdict with respect to such issues, but solely on the theory of disappearance, upon a finding that another, unrelated, section was violated.

Furthermore, in **Buticaps**, the government took a position directly contrary to its contention in the mandamus proceedings in the present case, and directly contrary to the result reached by the Court below. In **Buticaps**, the government requested that the case be reopened after the decree of condemnation and destruction, "for the purpose of trial on the 'merits of that one issue'" (See opinion at 252 F. 2d 636, footnote 4). That action by the government in the Buticaps proceeding contradicts the theory of the Court below that a decree of condemnation on one charge, eliminates the right of trial by jury on the merits of the other issues.

The opinion of the Court below (Appendix A) does not explain its conclusion that the jury issues, on which both parties wanted a jury verdict, disappeared from the case. The government did not stand on its motion for directed

verdict on the Section 403 (j) charge, but elected at the trial to submit all the issues to the jury. It did not seek to withdraw the false representation issues by dismissing them [in accordance with Rule 41 (a) (2) upon terms fixed by the Court], but insisted upon a verdict on those issues.

In its brief in support of the petition for mandamus, the government suggested that the false representation issues had become moot, and that there was an error in an instruction on labeling which vitiated the entire jury verdict (R. Item 1, pp. 14-21). There is nothing in the opinion to indicate that the Court accepted either of those suggestions, and there is no merit in them. It is apparent that the false representation issues remain alive as the primary controversy between the parties. As such issues were entirely distinct and separable from the Section 403 (j) issue, upon which the reversal was based, and were not challenged on appeal, the verdict as to them should not have been disturbed. See **Gasoline Products Co. v. Champlin R. Co.**, 283 U. S. 494, 499, 51 S. Ct. 513, and the brief for the respondent in the mandamus proceeding, Record, Item 6, pp. 16-17, 25-35.

Similarly there was no error in instructions affecting the false claim issues, and none was asserted by the government upon its appeal of the original libel judgment. The instructions on labeling were given as requested by the government. See brief for respondent in the mandamus proceeding, Record, Item 6, pp. 20-25.

This leaves for review by this Court the fundamental question whether the Court of Appeals may deprive the claimants of their right to a jury determination of contested issues of fact. By ordering that these issues have "disappeared from the case," the Court below has deprived claimants of their constitutional rights to the benefit of the jury verdict, which was obtained without error on such issues. In addition, the Court's order deprives

claimants of their **statutory** right to a jury determination of such issues as provided in Section 304 (b). The order goes beyond the nullification of the jury verdict on fact issues which were not before the Court of Appeals for review. By holding that such issues have "disappeared from the case" the Court has deprived claimants of their statutory right to **get** a judicial determination of those issues in the libel action, either initially by jury trial under Section 304 (b), or by exercise of their rights under Section 304 (d).

Finally, there is a substantial public interest in the judicial determination of the fact issues tendered by this and other libels under the Act. This public interest in the truth or falsity of the challenged representations made for the seized articles, is frustrated by the Court's ruling that those issues have "disappeared from the case."

2. Allowance of Costs Under Section 304 (e).

The effect of the opinion and order of May 28, 1958 (Appendix A, B), is a holding that Section 304 (e) of the Act deprives the District Court of any discretion in determining the extent of the statutory costs to be awarded against the claimants after a decree of condemnation has been entered. Again the Court gives no explanation of how it reaches this result.

Its conclusion is in conflict with the opinion of the Tenth Circuit in **United States v. Arizona Canning Company**, 10 Cir., 212 F. 2d 532. Under similar circumstances of a judgment of condemnation, the Tenth Circuit there held that the **extent** of the costs to be assessed under this Act remains discretionary with the trial court. In particular, the Tenth Circuit ruled that the district judge had discretion to determine whether attendance of particular witnesses was necessary for the establishment of the government's case (212 F. 2d 532 at 534-535).

Apart from the absence of authority to support the view that Section 304 (e) was intended to deprive the trial court of its inherent power to exercise discretion in the allowance of costs, the instant case illustrates the basic unfairness of such construction. Only a small fraction of the costs of the libel proceeding could be attributed to the litigation of the single issue upon which the government ultimately prevailed, the Section 403 (j) charge. Nevertheless, under the order of the Court below, the claimants will be compelled to pay the entire costs attributable to the unsuccessful effort of the government to prove that Sections 402 (a) and 502 (a) were violated.

Furthermore, in a libel proceeding of this type, in which witnesses can be subpoenaed from any district in the United States (21 U. S. C. 337), the matter of costs for transportation and attendance of witnesse becomes burdensome to the point of being punitive. It is only fair and equitable, under such circumstances, for the trial court to exercise discretion to limit the costs under the statutory items to those which are reasonably attributable to the establishment of issues won by the government. That is what the district judge did in paragraph 5 of the judgment (Appendix E), which the Court below has ordered stricken.

3. The Effect on Other Litigants Under the Act.

The ruling of the Court below, if allowed to stand as a precedent, will have great and recurring impact on the course of libel actions under this Act, and on the rights of many litigants. The scope of its effect is shown by the fact that, in the five-year period, 1952-1956, over six thousand seizure actions were instituted under this Act. (See statistical tables, Annual Reports of Food and Drug Administration 1952-1956.)

The ruling below, that the district courts are deprived of any discretion on the allowance of costs, will be a precedent applicable to every libel action under this Act; the ruling with respect to the disappearance of jury issues will

be a precedent in every libel alleging multiple misbrandings, which is the usual form of the libel.

The effect of the decision is to make the defense of the property rights involved in such actions a hazardous and futile undertaking, even when the claimant prevails on the substantial merits of the litigation. For, under the ruling of this case, if the government wins on one issue and loses on sixty-five others, the sixty-five issues will disappear from the case as though they had never been tried. The claimant is left burdened with the entire costs of the government's failure of proof, while the government is free to litigate the lost issues in a subsequent action. (That is precisely what occurred in the case below where the jury verdict was against the government on all of its sixty-five allegations of false representations.)

Thus in a libel containing multiple charges the claimant is faced with the dilemma either of permitting unfounded charges to become res judicata against him by default, or of defending with the prospect that, despite a successful defense of the unfounded charges, the entire costs of the proceeding will be taxed against him, but he will be denied the benefit of his disproof of such charges.

Although proof of one misbranding will support a decree of condemnation, that does not mean that a claimant can be deprived of the benefit of a jury determination in his favor on other alleged misbrandings. To do so is to deprive him of rights accorded by the Act and guaranteed by the Fifth and Seventh Amendments. That is what the Court below has done.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD L. WRIGHT,
ROBERT F. SCHLAFLY,
Attorneys for Petitioners.

APPENDIX.

APPENDIX A.

Opinion of the Court of Appeals on Mandamus Proceeding.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,972.

United States of America, Petitioner, vs. The Honorable John E. Miller, Judge of the United States District Court for the Western District of Arkansas, Respondent. Mountain Valley Sales Company, an Arkansas corporation, H. B. McFarling and John G. Scott, Intervenors.	On Petition for a Writ of Mandamus to the United States District Court for the Western District of Arkansas.

[May 28, 1958.]

Paul M. Steffy, Attorney, Department of Health, Education, and Welfare, (Rufus McLean, Acting Assistant Attorney General, Charles W. Atkinson, United States Attorney, Frank J. Kiernan, Attorney, Department of Justice, and William W. Goodrich, Assistant General Counsel, Department of Health, Education and Welfare, were with him on the brief) for Petitioner.

Robert F. Schlafly (Edward L. Wright and J. L. Schlafly, Jr., were with him on the brief) for Respondent.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Per Curiam.

This Court, on August 6, 1957, in No. 15,679, **United States v. 353 Cases * * * Mountain Valley Mineral Water * * *; Mountain Valley Sales Company, a corporation, John G. Scott, and H. B. McFarling, Claimants,** a libel proceeding, reversed the judgment appealed from. The judgment in favor of the claimants was based upon the verdict of a jury finding all issues in their favor. The reversal of the judgment by this Court was based upon its conclusion that all of the sales literature involved in advertising the water was, as a matter of law, "labeling"; that the evidence conclusively showed that the mineral water in suit had been recommended for special dietary uses, and that the labels on the bottles did not contain the information required by applicable regulations; that, at the close of the evidence, the Government was entitled to a directed verdict, and that the trial court erred in denying the Government's motion for such a verdict. We remanded the case with directions to enter a judgment of condemnation. 247 F. 2d 473.

The parties, after the remand of the case, were unable to agree upon the form of judgment required by our opinion and mandate. Judge Miller, for the District Court, entered a judgment of condemnation, but, over the objections of the Government, included in it a paragraph 2 reading as follows:

> "That pursuant to the verdict herein returned on June 6, 1956, with respect to the charges contained in Paragraphs 3 and 5 of said libel of information, alleging a misbranding of said water within the meaning of 21 U. S. C. 352 (a) and 21 U. S. C. 343 (a) because of false and misleading representations, which issues were submitted to the jury by consent of the parties, and in accordance with said jury verdict in favor of

> the claimants on all said issues, the charges contained in Paragraphs 3 and 5 of said libel of information are hereby dismissed with prejudice to the libelant."

This was done upon the theory that the claimants were, notwithstanding the reversal of the judgment appealed from in the libel proceeding, entitled to the benefit of so much of that judgment as was based upon the verdict of the jury with respect to the issue of alleged misrepresentations in labeling, in so far as that issue was claimed to be unrelated to the question of the alleged representations of the water for dietary uses. In providing for the recovery by the Government of costs and expenses in paragraph 5 of the judgment entered on our mandate, Judge Miller also added the words, "which are directly referable to the misbranding adjudged herein." To this the Government also objected.

The purpose of the instant mandamus proceeding brought by the Government against Judge Miller is to secure the elimination from the final judgment of those portions above referred to.

It is our opinion that every element and issue which inhered in the verdict upon which the judgment appealed from in the libel proceeding was based, disappeared from the case when this Court reversed that judgment and directed the entry of a judgment in favor of the Government on the ground that, under the evidence and as a matter of law, it was entitled to a judgment of condemnation at the close of the evidence. We are satisfied that the Government is entitled to have eliminated the challenged portions of the judgment which was entered after the remand of the libel proceeding.

We think it is unnecessary to issue a writ of mandamus, since we have no doubt that Judge Miller will readily

comply with this Court's views as to the form of judgment required by its mandate. He is directed to amend the judgment by eliminating paragraph 2 and striking out in paragraph 5 the words, "which are directly referable to the misbranding adjudged herein." As so amended the judgment will conform to the mandate of this Court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court of Appeals on the Mandamus Proceeding.

(Order.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15972. September Term, 1957.

Wednesday, May 28, 1958.

United States of America, Petitioner,

vs.

The Honorable John E. Miller, Judge of the United States District Court for the Western District of Arkansas, Respondent,

Mountain Valley Sales Company, an Arkansas Corporation, H. B. McFarling and John G. Scott, Intervenors.

On Petition For Writ of Mandamus.

This matter came on to be heard on the petition for a Writ of Mandamus to the United States District Court for the Western District of Arkansas; the Memorandum brief in support thereof, and brief of the respondent in opposition, and was argued by counsel.

The Opinion of this Court is filed today finding that the Judgment entered by the District Court on December 19, 1957, does not comply with the mandate of this Court in case No. 15679. However, no writ of mandamus will

now issue, and if action is promptly taken by Respondent in accordance with the opinion of this Court filed today none will be required.

It is further Ordered that Respondent file with the Clerk of this Court a copy of the Judgment entered by him in the District Court in the case of United States of America, Libelant, v. 353 Cases, more or less, each containing 6 one-half gallon bottles, etc., et al., Civil No. 565, Hot Springs Division.

May 28, 1958.

APPENDIX C.

Opinion of the Court of Appeals on the Appeal of the Libel Action.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,679.

United States of America,
Appellant,
vs.
353 Cases * * * Mountain Valley Mineral Water * * *; Mountain Valley Sales Company, a Corporation, John G. Scott, and H. B. McFarling, Claimants,
Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

[August 6, 1957.]

Paul M. Steffy, Attorney, Department of Health, Education, and Welfare (Warren Olney III, Assistant Attorney General, Charles W. Atkinson, United States Attorney, Frank J. Kiernan, Attorney, Department of Justice and William W. Goodrich, Assistant General Counsel, Department of Health, Education, and Welfare, were with him on the brief), for Appellant.

J. F. Schlafly, Jr. (Robert F. Schlafly and Edward L. Wright were with him on the brief), for Appellees.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Sanborn, Circuit Judge.

This is an appeal by the United States from an adverse judgment in a libel proceeding brought by it on August 19, 1953, in the Western District of Tennessee, for the condemnation, under § 304 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended; 21 U. S. C. § 334 (a), of a quantity of allegedly misbranded Mountain Valley Mineral Water, bottled by the Mountain Valley Spring Company, of Hot Springs, Arkansas, and shipped in interstate commerce. At the time of seizure in the libel proceeding, the water and its accompanying sales literature was located at 2089 Madison Avenue, Memphis, Tennessee, in the possession of an authorized distributor, Henry Branson McFarling, doing business as Mountain Valley Water Company.

How the case came ultimately to be tried, in the spring of 1956, before the United States District Court for the Western District of Arkansas and a jury at Hot Springs, Arkansas, can be gathered from **United States v. United States District Court for the Eastern District of Arkansas**, 8 Cir., 226 F. 2d 238.

The claim of the Government that the water was misbranded, and therefore subject to condemnation, was based upon the assertions: (1) that the "labeling" (promotional sales literature and advertising), accompanying the water,[1] falsely represented it to be an adequate and effective treatment for various diseases and disorders, and contained other false statements [§ 502 (a) of the Act; 21 U. S. C.

[1] By § 201 (m) of the Act, 21 U. S. C., § 321 (m), "labeling" means "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article," in the sense of supplementing or explaining it. *Kordel v. United States*, 335 U. S. 345, 350; *U. E. Irons, Inc., v. United States*, 1 Cir., 244 F. 2d 34, 39. "Label" is defined as "a display of written, printed, or graphic matter upon the immediate container of any article; * * *." Sec. 201 (k) of the Act; 21 U. S. C., § 321 (k).

§ 352 (a)];[2] and (2) that the water was represented for special dietary uses, and that its label did not bear the information concerning its mineral properties, determined by regulations (21 C. F. R. § 125.4, promulgated in 1941) to be necessary "in order fully to inform purchasers as to its value for such uses," as is required by § 403 (j) of the Act; 21 U. S. C. § 343 (j).[3]

The Mountain Valley Sales Company, of Hot Springs, Arkansas, a subsidiary of the Mountain Valley Spring Company which bottled the water, filed a claim for the water and a separate claim for "24 pamphlets, more or less, entitled 'Your Health Begins With Nature'," and "24 pamphlets, more or less, entitled, 'Mountain Valley Water From Hot Springs, Arkansas, in Pregnancy and Care of Children'," which pamphlets had been seized in the libel proceeding.

John G. Scott, of Yonkers, New York, "the Mountain Valley distributor in New York and in the New York area," filed a claim asserting ownership of three of the seized pamphlets entitled, "Helping to Stay Young Through Minerals." He moved to dismiss the libel as to

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[2] "§ 352. [21 U. S. C.] *Misbranded drugs* * * *

"A drug * * * shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular."

[3] "§ 343. [21 U. S. C.] *Misbranded food*

"A food shall be deemed to be misbranded—

* * * * * * *

"(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the [Federal Security] Administrator [the Secretary of Health, Education, and Welfare since April 11, 1953, 67 Stat. 631, 632] determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses."

"Food" is defined by § 201 (f) of the Act, 21 U. S. C., § 321 (f), as "(1) articles used for food or drink for man or other animals, * * *."

the three pamphlets on the ground that they did not constitute labeling and had been unlawfully seized. He also moved to suppress the pamphlets as evidence, on the ground that they had been obtained in violation of his constitutional rights; this upon the theory that Government Agents had unlawfully used decoys and subterfuge in procuring the pamphlets from the Memphis distributor.

McFarling, the distributor from whom the water and pamphlets were taken, filed a claim for the following seized literature, of which he asserted he was the owner:

> "146 pamphlets, more or less, entitled 'The Importance of Mountain Valley Water in Arthritic and Rheumatic Disorders'
>
> "80 pamphlets, more or less, entitled 'The Importance of Mountain Valley Water in Kidney and Bladder Disorders'
>
> "7 pamphlets, more or less, entitled 'The Story of Mountain Valley Mineral Water from Hot Springs, Arkansas'
>
> "123 pamphlets, more or less, entitled 'Is Your Trouble Mineral Deficiency?'
>
> "500 pamphlets, more or less, entitled 'Facts About Mountain Valley Mineral Water from Hot Springs, Arkansas'
>
> "4 pamphlets, more or less, entitled 'Why Everyone Should Drink Two Quarts of Water Each Day'
>
> "50 pamphlets, more or less, entitled 'How Much Mountain Valley Mineral Water Should I Drink?' "

McFarling also filed a motion to suppress the pamphlets as evidence.

The trial court deferred ruling on the several motions to suppress evidence and to dismiss the libel, until the trial of the case on the merits. The motions ultimately disappeared from the case.

All of the claimants were represented by the same counsel. It is apparent from the record that the party most interested in defending against the libel was the Mountain Valley Spring Company, of Hot Springs, Arkansas. It has for many years bottled the water from the Mountain Valley Spring, which is located about ten miles by road from the city of Hot Springs, and has sold the water rather generally throughout the United States to authorized distributors, and to dealers through its subsidiary the Mountain Valley Sales Company.

At the trial, the issues were: (1) whether the sales literature introduced in evidence by the Government constituted "labeling" of the water within the meaning of 21 U. S. C. § 321 (m); (2) whether the labeling was "false or misleading in any particular" [21 U. S. C. § 352 (a)]; and (3) whether the water was represented for special dietary uses.

The Government, having the burden of proof, first introduced its evidence tending to support its charges that the representations contained in much of the sales literature with respect to the medicinal and therapeutic qualities of the water were false or misleading, and to show that the water was represented for special dietary uses. The claimants then introduced evidence to show that the representations contained in four pamphlets, which they contended were the only ones used by the Memphis distributor, and therefore the only ones constituting "labeling", were not false or misleading. They denied that the water was represented for special dietary uses, but did not claim that the labels on the bottles contained the information required by 21 U. S. C. § 343 (j).

At the close of the claimants' evidence, the Government made a written motion for a directed verdict on the grounds:

"The uncontroverted evidence in this case shows that Mountain Valley Mineral Water is recommended and suggested for use as a food for special dietary uses because of its mineral content. The labels on both sizes of bottles seized fail to bear the information required by 21 U. S. C. [§] 343 (j) and 21 C. F. R. [§] 125.4. For this reason, the mineral water is, as a matter of law, misbranded within the meaning of 21 U. S. C. [§] 343 (j) and should be condemned pursuant to 21 U. S. C. [§] 334 (a) & (b)."

In ruling upon the motion, the court said:

"Now, this motion of the plaintiff or libelant for a directed verdict on the question of the alleged misbranding of the water as appearing in the exhibit, the bottles introduced here, raises this question. Water may be considered a food when used under the statute for dietary uses. Now, if the court was satisfied that this water was recommended for special dietary uses, then I think the motion probably should be granted, but I am not certain at all on that. * * * I think that is a qu tion that the court must submit to the jury."

At the time of this ruling, the trial was virtually at an end so far as the taking of evidence was concerned, and the court was considering requests for instructions. The court then said to counsel: "I think we can reasonably assume that the testimony will close this afternoon, at 2:30 or 3:00." The record shows that the Government called two rebuttal witnesses, and the claimants called one witness on surrebuttal. This additional testimony had nothing to do with the question whether the water was represented for special dietary uses. At the close of this rebuttal evidence, the Government's motion for a directed verdict was not renewed. But when the Court called upon counsel for their objections, if any, to the instructions, counsel for the Government said:

"The libelant has no objections except for the failure to direct a verdict upon the charge that the water is misbranded because it fails to bear statements required by Section 343-J of the Federal Food, Drug and Cosmetic Act, since it is represented as a food for special dietary uses because of its mineral content * * *."

The court overruled the objection.

The jury's verdict found all issues in favor of the claimants. The Government moved for judgment notwithstanding the verdict, in accordance with its motion for a directed verdict. This the court denied on the grounds (1) that by not renewing the motion for a directed verdict at the close of the entire evidence, the motion was waived, and (2) that the issues were all issues of fact and the verdict of the jury was supported by the evidence. The opinion of the court is found at 143 F. Supp. 219.

The claimants now insist that the failure of the Government to renew its motion for a directed verdict after the last witness had testified precludes the review of the question whether, under the evidence and the applicable law, the case was mistakenly submitted to the jury.

O'Malley v. Cover, 8 Cir., 221 F. 2d 156, states the well known general rule that to preserve for review the question of the sufficiency of the evidence to take a case to the jury there must be a motion for a directed verdict at the close of the evidence. The Government contends that, under the evidence, misbranding of the water was conclusively proven, and that this was sharply, definitely and adequately called to the attention of the trial court by the motion for a directed verdict made at the close of all of the evidence which had anything to do with the grounds upon which the motion was based, as well as by the Government's objection, before the jury retired, to the court's failure to direct a verdict.

We think that as a practical matter the Government did all that was necessary to preserve for review the question whether it was entitled to a directed verdict. This Court, moreover, in the public interest and to guard against injustice, may, of its own motion, notice errors which have not been properly preserved for review, if such errors are obvious, or if they otherwise seriously affect the fairness and integrity of the judicial proceedings. **United States v. Socony-Vacuum Oil Co., Inc.** 310 U. S. 150, 239; **United States v. Bernays,** 8 Cir., 158 F. 791, 794; **New York Life Ins. Co. v. Rankin,** 8 Cir., 162 F. 103, 108; **Baltimore & Ohio Railroad Co. v. McCune,** 3 Cir., 174 F. 991, 992; **Hart v. Adair,** 9 Cir., 244 F. 897, 900; **Ayers v. United States,** 8 Cir., 58 F. 2d 607, 609; **Prudential Ins. Co. of America v. Morris,** 3 Cir., 72 F. 2d 824; **Cox v. United States,** 8 Cir., 96 F. 2d 41, 43.

We have not insisted upon technical perfection in the preservation of alleged errors for review. In the recent case of **Railway Express Agency, Inc., v. Epperson,** 8 Cir., 240 F. 2d 189, counsel for the defendant moved for a directed verdict at the close of the evidence, but his motion was defective in failing to state "the specific grounds therefor," as required by Rule 50 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. A ruling that the motion was inadequate to preserve for review the question of the sufficiency of the evidence to take the case to the jury would have been technically correct. We said (page 193 of 240 F. 2d): "There was nothing specific about the grounds stated by defendant's counsel in his motion for a directed verdict. It is apparent, however, that the trial judge knew what counsel was driving at. So once again we shall accept intent for performance." And Rule 1 of the Federal Rules of Civil Procedure provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

The public has too vital an interest in the proper and truthful labeling of whatever is sold for human consump-

tion to justify basing a decision upon what, under the circumstances, was a mere technical oversight which misled neither the trial court nor opposing counsel. If, under the evidence and the applicable law, the water was misbranded, it ought to be condemned in the public interest. "The problem is a practical one of consumer protection, not dialectics." **United States v. Urbuteit**, 335 U. S. 355, 358.

How much of the sales literature seized with the water in Memphis constituted "labeling" within the meaning of 21 U. S. C. § 321 (m) was an issue in the case. Of the eight pamphlets seized in the distributor's place of business and introduced in evidence, the claimants conceded that four were "labeling", namely those entitled: "Facts About Mountain Valley Mineral Water from Hot Springs, Arkansas"; "How Much Mountain Valley Mineral Water Should You Drink?"; "The Importance of Mountain Valley Water in Arthritic and Rheumatic Disorders"; and "The Importance of Mountain Valley Water in Kidney and Bladder Disorders." The other four, which bore the following titles, "Mountain Valley Water from Hot Springs, Arkansas, in Pregnancy and Care of Children"; "Your Health Begins With Nature"; "Is Your Trouble Mineral Deficiency?"; and "The Story of Mountain Valley Mineral Water from Hot Springs, Arkansas," the Government contended were also "labeling". The claimants, however, insisted that they were not. This, ostensibly because of evidence that they had not been used by the distributor in connection with selling the water in Memphis. However, all of the pamphlets were obviously printed for use generally in promoting the sale of the water, and were useful for no other purpose. All of them were found in the place of business of the local distributor, and were approved advertising matter, available upon request. The President of the Mountain Valley Spring Company testi-

fied, as a witness for the claimants, that he knew of no sales literature being printed that was not approved.

The interpretation accorded the phrase "special dietary uses" by the agency selected by Congress to enforce the Federal Food, Drug, and Cosmetic Act is found at 21 C. F. R. § 1.11, and reads as follows:

> "§ 1.11 **Special dietary uses.** (a) The term 'special dietary uses', as applied to food for man, means particular (as distinguished from general) uses of food, as follows:
>
> "(1) Uses for supplying particular dietary needs which exist by reason of a physical, physiological, pathological or other condition, including but not limited to the conditions of diseases, convalescence, pregnancy, lactation, allergic hypersensitivity to food, underweight, and overweight;
>
> "(2) Uses for supplying particular dietary needs which exist by reason of age, including but not limited to the ages of infancy and childhood;
>
> "(3) Uses for supplementing or fortifying the ordinary or usual diet with any vitamin, mineral, or other dietary property. Any such particular use of a food is a special dietary use, regardless of whether such food also purports to be or is represented for general use.
>
> * * * * * * * "

We do not propose to set out in this opinion all of the statements in all of the pamphlets, which the Government contends were conclusively shown by the evidence to constitute "labeling", representing that the water has "special dietary uses". From the sales literature received in evidence, it is clear that the water was recommended for such uses. In the pamphlet "Facts About Mountain Valley Mineral Water From Hot Springs, Ark." (conceded by claimants to be "labeling"), the following appears:

"What makes it so helpful?

• • • • • • •

"4. Its low sodium. Mountain Valley Water, with less than 3 parts per million, is ideal for the low-salt diet often advised in High Blood Pressure and Congestive Heart conditions.

"5. Its aid to digestion. When used daily for a few weeks, Mountain Valley Water tends to improve the digestion of protein and fat substances of food.

• • • • • • •

"7. Its helpful trace minerals, including fluorine for teeth and dental caries.

• • • • • • •

"**Does It Over-mineralize the System?** No. Laboratory research indicates that the predominant mineral in Mountain Valley Water—calcium—is utilized by the body, but where the body already receives an adequate supply of calcium, the drinking of Mountain Valley Water does not tend to increase the amount of calcium in the body.

• • • • • • •

"Where Mountain Valley Water is not being used as an aid in treatment, it is usually consumed in place of ordinary water, with and between meals."

In "How Much Mountain Valley Mineral Water Should I Drink?", appears:

"With Meals—Competent medical opinion today advises water with meals. Mountain Valley is especially suitable, furnishing assimilable calcium, magnesium and other vital minerals."

In "The Importance of Mountain Valley Water in Kidney and Bladder Disorders", appears the statement that "Pure Mountain Valley Water contains certain minerals which help proper kidney function."

In "Your Health Begins With Nature", which the claimants deny was "labeling", but which, we think, obviously, was "labeling", there were many statements representing the water as a dietary supplement. The following are examples:

"The influence of Mountain Valley on the metabolic process, the changing of food to heat-energy, is most healthful. This assistance benefits all ages—from infants to elderly men and women. Children need Mountain Valley Water to supplement the calcium they use for teeth and bones. Adults appreciate Mountain Valley for the general 'good health' which seems to be with those who drink it regularly.

* * * * * * * *

"Mineral Analysis in Parts Per Million.

"Calcium Bicarbonate—315.43—The rich calcium intake available in Mountain Valley Water helps prevent decalcification in many cases. It contributes to the bone-building process, helps ward off bone diseases, and stimulates kidney secretion.

* * * * * * * *

"Sodium—2.88—Mountain Valley's remarkably low sodium content is especially important to persons suffering from congestive heart failure, high blood pressure, and certain kidney conditions. It is often recommended by doctors to patients on low sodium diets.

* * * * * * * *

"Pregnancy

* * * * * * * *

"Mountain Valley is also prescribed for its high assimilable calcium content. During the latter half of pregnancy, the mother is required to supply the baby large amounts of calcium for bone building. If sufficient calcium isn't supplied by the mother's diet, decalcification of the mother's bones or teeth often occurs.

"Frequently during pregnancy the attending physician will recommend a low salt diet. In such cases Mountain Valley is particularly advisable because of its exceptionally low sodium content.

"Diarrhea

"During infancy and sometimes adulthood, chronic diarrhea may be complicated by the development of tetany, a condition of muscular spasms which is due to inadequate calcium in the blood. A similar condition occurs in certain disturbances of the parathyroid glands. Under both of these circumstances, Mountain Valley Water, because of its usable calcium, is a valuable dietary adjunct."

The other pamphlets in evidence we think are largely cumulative and need not be referred to.

We think that all of the sales literature received in evidence was, as a matter of law, "labeling" (see and compare, **Kordel v. United States**, 335 U. S. 345, 350; **United States v. Urbuteit**, supra, 335 U. S. 355, 358; **V. E. Irons, Inc., v. United States**, 1 Cir., 244 F. 2d 34, 39); and that the question whether the literature was "labeling" was not an issue for the jury.

While no question as to the validity of regulation § 1.11 (21 C. F. R.) defining "special dietary uses" was raised in the trial, and although a federal appellate court is seldom justified in ruling upon a question not raised or ruled upon at the trial (**Warner v. Dworsky**, 8 Cir., 194 F. 2d 277, 278), the claimants challenge the validity of the regulation upon the ground that it was not issued pursuant to a hearing, evidence, and detailed findings of fact, as required by § 701. (e) of the Act; 21 U. S. C. § 371 (e). We cannot agree. The regulation is an interpretative ruling which merely states the meaning accorded to the phrase "special dietary uses" by the Federal Food and Drug Administra-

tion. The ruling was adopted more than fifteen years ago. It did not prescribe the information which must apppear on the label of the containers for foods for special dietary uses. The regulations prescribing the required information appear at 21 C. F. R. § 125.4. It is unnecessary to set them out in this opinion, since it is conceded that the labels on the bottles did not contain the required information. These regulations were adopted after notice and hearing, and the contention that they are invalid because the ruling § 1.11 explaining the meaning the Food and Drug Administration proposed to place on the phrase "special dietary uses" was issued without notice and hearing, we regard as without merit.

In **Gibson Wine Co., Inc., v. Snyder**, D. C. Cir., 194 F. 2d 329, 331, the court said:

> "The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means. * * * *."

In fairness to the claimants, it should be said that no suggestion has been made that the water in suit is adulterated or is not a wholesome, natural mineral spring water, suitable for human consumption. The Federal Food and Drug Administration, which the claimants evidently regard as unjustifiably intermeddling in their affairs, does not see eye to eye with them in regard to many of their representations of the curative, remedial, medicinal and dietary properties of the water. Some of these

representations are unquestionably fanciful, and some, no doubt, extravagant. It seems unfortunate that the water should not be sold for what it is and in conformity with the applicable regulations of the Federal Food and Drug Administration.

Our conclusion is that the water in suit was conclusively shown to be misbranded, because it was represented, by its labeling, for special dietary uses and because the labels on the bottles did not contain the information required by the applicable regulations.

The judgment appealed from is reversed, and the case is remanded with directions to enter a judgment of condemnation.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D.

Judgment of the Court of Appeals on the Appeal of the Libel Action.

(Judgment.)

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15679—September Term, 1956.

Tuesday, August 6th, 1957.

United States of America, Appellant,

vs.

353 Cases, more or less, each containing 6 one-half gallon bottles, and 81 five-gallon carboys, more or less, of an article of food and drug, labeled in part: "Mountain Valley Mineral Water" et al.; Mountain Valley Sales Company, a corporation, John G. Scott, H. B. McFarling, Claimants. Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court with directions to enter a judgment of condemnation.

August 6th, 1957.

APPENDIX E.

Judgment of the District Court.

UNITED STATES DISTRICT COURT,
Western District of Arkansas,
Hot Springs Division.

United States of America, Libelant, vs. 353 Cases, More or Less, Each Containing 6 One-Half Gallon Bottles, and 81 Five-Gallon Carboys, More or Less, of an Article of Food and Drug, Labeled in Part: "Mountain Valley Mineral Water," et al., Mountain Valley Sales Company, a Corporation; John G. Scott, H. B. McFarling, Claimants.	Civil No. 565.

Judgment.

The mandate of the United States Court of Appeals for the Eighth Circuit on the appeal of the libelant heretofore taken in this cause having been transmitted to the Clerk of this Court and filed herein on August 29, 1957, and the same having been brought to the attention of the Court, and upon consideration of the mandate and of the opinion of the United States Court of Appeals for the Eighth Circuit referred to in the mandate, in compliance therewith it is hereby

Ordered, Adjudged and Decreed by this Court as follows:

1. That the judgment of this Court entered herein on June 2, 1956, be and the same is hereby vacated and set aside and the libel of information reinstated;

2. That pursuant to the verdict herein returned on June 6, 1956, with respect to the charges contained in Paragraphs 3 and 5 of said libel of information, alleging a misbranding of said water within the meaning of 21 U. S. C. 352 (a) and 21 U. S. C. 343 (a) because of false and misleading representations, which issues were submitted to the jury by consent of the parties, and in accordance with said jury verdict in favor of the claimants on all said issues, the charges contained in Paragraphs 3 and 5 of said libel of information are hereby dismissed with prejudice to the libelant;

3. That as a matter of law the water in suit was misbranded within the meaning of 21 U. S. C. 343 (j) because it was represented by its labeling as a food for special dietary uses by reason of its mineral content and because the labels on the bottles did not contain the information required by that section and by the applicable regulations appearing at 21 C. F. R. 125.4; that by reason of said violation of 21 U. S. C. 343 (j) said water under seizure is hereby condemned and forfeited to the use of the United States;

4. That the United States Marshal for this District destroy the water libeled herein pursuant to this judgment of condemnation;

5. That the libelant have and recover from the claimant, Mountain Valley Sales Company, the court costs and fees of this action, including storage and other proper expenses which are directly referable to the misbranding adjudged herein.

To the foregoing action of the Court the libelant objects and excepts.

Dated December 19, 1957.

/S/ Jno E. Miller,
United States District Judge.

A True Copy:

Attest: Truss Russell, Clerk,
By Marion Heindricks,
Deputy Clerk.

APPENDIX F.

Constitutional Provisions and Statute Involved.

Amendment V to the Constitution of the United States:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII to the Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Food, Drug and Cosmetic Act of 1938:

Section 304.

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at anytime thereafter, on libel of informa

tion and condemned in any district court of the United States within the jurisdiction of which the article is found:

* * * * * * *

Section 304.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury.

* * * * * * *

Section 304.

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: Provided, that after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond.

* * * * * * *

Section 304.

(c) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

* * * * * * * *

Section 403.

A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * * * * *

(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

* * * * * * * *

Section 502.

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

FILE COPY

No. 249

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

H. B. MCFARLING, JOHN G. SCOTT, AND MOUNTAIN VALLEY SALES CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

WILLIAM W. GOODRICH,
Assistant General Counsel,
PAUL M. STEFFY,
Attorney,
Department of Health, Education and Welfare,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

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H. B. MCFARLING, JOHN G. SCOTT, AND MOUNTAIN VALLEY SALES CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in the mandamus proceeding (Pet. App. 15-18) is not yet reported. The earlier opinion of the Court of Appeals is reported at 247 F. 2d 473.

JURISDICTION

The order of the Court of Appeals was entered on May 28, 1958 (Pet. App. 19). A petition for rehearing was denied on June 27, 1958. The petition for a writ of certiorari was filed August 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where a district court attempted to give effect to a jury verdict which the appellate court had held to be based upon an erroneous instruction, the appellate court may correct such action by ordering stricken from the decree the provisions based upon the voided verdict.

2. Whether a district court may limit costs upon a theory inconsistent with the mandate and opinion of the reviewing court.

STATEMENT

Petitioners, intervenors in the mandamus proceedings below, seek review of an order of the Court of Appeals compelling compliance by the District Court for the Western District of Arkansas with the Court of Appeals' prior mandate issued after reversal of a judgment against the United States in a seizure action under the Federal Food, Drug, and Cosmetic Act (see 247 F. 2d 473). The petitioners here were appellees on the original appeal.

As appears from the earlier opinion of the Court of Appeals (Pet. App. 21-35), the original action was for condemnation of a quantity of bottled mineral water, alleged to have been misbranded in that (1) the "labeling" (promotional literature) falsely represented it to be an effective treatment of various diseases in violation of Section 502(a), 21 U.S.C. 352(a), and (2) that the water was represented for special dietary uses without its labeling bearing information as to its mineral properties, in violation of Section 403(j), 21 U.S.C. 343(j).

At the close of the trial before a jury at Hot Springs,

Arkansas,[1] the government filed a motion for a directed verdict on the ground that uncontroverted evidence established that the water was recommended for dietary use and that the labels failed to contain the information required by the applicable regulations as to products so recommended. The court denied the motion, and submitted the issue to the jury. The court also submitted to the jury the question of whether the promotional literature constituted labeling, and whether it was false and misleading. The jury found in favor of the petitioners.

On appeal, the Court of Appeals reversed. It held that the district court erred in not directing a verdict for the government on the Section 403 charge that the water was recommended for dietary use without proper information on the label. It also held (Pet. App. 33) that "all of the sales literature received in evidence was, as a matter of law, 'labeling' * * * and that the question whether the literature was 'labeling' was not an issue for the jury."

The mandate, filed in the District Court on August 29, 1957, ordered reversal, and the entry of a decree of condemnation (Pet. App. 36, 37).

On December 19, 1957, the District Court entered a judgment of condemnation and destruction finding the water misbranded under Section 403(j) of the Federal Food, Drug, and Cosmetic Act. However, it also ordered the government's charges concerning false and misleading labeling claims dismissed with prejudice, and, consistent with this dismissal of part of the case, limited costs to those directly attributable to proof of

[1] The case was originally filed in Memphis, Tennessee, but removed first to Little Rock and then to Hot Springs after lengthy pretrial litigation. 226 F. 2d 238.

the charge of misbranding under Section 403(j). The dismissal with prejudice and the limitation of costs were based upon the trial court's belief that the jury verdict had not been reversed as to the false and misleading labeling claims (Pet. App. 37-39).

The government petitioned for mandamus to compel the trial court to adhere to the prior opinion and mandate of the Court of Appeals. That court found that the judgment as entered did not conform to its mandate. It directed the District Court to eliminate the paragraph dismissing the misleading charge with prejudice, and to strike out the limitation of costs (Pet. App. 15-20). The Court of Appeals was of the view that "every element and issue which inhered in the verdict upon which the judgment appealed from in the libel proceeding was based, disappeared from the case when this Court reversed that judgment and directed the entry of a judgment in favor of the Government on the ground that, under the evidence and as a matter of law, it was entitled to a judgment of condemnation at the close of the evidence" (Pet. App. 17).

ARGUMENT

The petition for a writ of certiorari seeks to have this Court correct the Eighth Circuit's own interpretation of its prior opinion. That court is in the best position to say what its prior decision held, and there is no need for further review.

1. Petitioners' argument is based on the assumption that, in its original reversal, the Court of Appeals found no error which would affect the verdict in their favor on charges of false and misleading labeling claims. On this assumption, they argue (Pet. 8-12) that they have been deprived of the benefit of a trial by jury:

The record is clear, however, that the Court of Appeals found, not only that the case should never have gone to the jury in the first place, but that it was error to submit to the jury the issue of whether the promotional material was labeling (Pet. App. 33, see quotation, *supra*, p. 3).

At the trial, the claimants admitted that four pamphlets were labeling, but contended that four other pamphlets (No. 15679, R. 355, 357, 373, 385) were not. The district judge charged the jury that it was free to find that the four challenged pamphlets were not "labeling"; and, if not, they could ignore any false or misleading statements in such pamphlets in deciding whether the spring water was misbranded by false and misleading claims (No. 15679, R. 299). It is thus impossible to tell whether the verdict in petitioners' favor on the misleading statements charge was based on the erroneous theory that the four challenged pamphlets (which contained the most direct statements as to curative value) were not labeling, or on a finding that the statements were not misleading. Since the issue went to the jury on improper instructions, the verdict was not, as petitioners claim, a clear-cut ruling in their favor "which was obtained without error on such issues" (Pet. 11). It was a verdict based on an instruction found to be erroneous, therefore a verdict which could have no validity. The Court of Appeals was acting consistently with its prior opinion when it found that the district judge erred in attempting to give effect to the verdict by dismissing with prejudice the government's charges of false and misleading labeling claims (Pet. App. 37, 38). As this Court pointed out in *United States v. United States District Court*, 334 U.S. 258, 264, it is "a high function of mandamus to

keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court."

The action of the Court of Appeals is not, as petitioners assert (Pet. 9-10), in conflict with *Buticaps, Inc.* v. *United States*, 252 F. 2d 634 (C.A. D.C.). In the *Buticaps* case, after judgment on the pleadings had been granted in favor of the government, the claimant attempted to obtain an adjudication as to whether the name, "Buticaps", was itself false and misleading. The District Court, which had agreed to allow relabeling, refused to adjudicate the dispute between the government and the claimant as to what would constitute proper relabeling to correct the falsehoods, and instead ordered the article destroyed. The Court of Appeals reversed, holding that the government could proceed to a decree of relabeling on the admitted falsehoods, or seek a hearing on the issue of the truth or falsity of the name, but that claimant could not be deprived of the name without a judicial hearing.

Here, it is undisputed that the bottles at issue have properly been ordered condemned. Despite this, petitioners are seeking a judgment in their favor that their promotional material is not misleading. Since, for the reasons discussed above, there is no valid adjudication to such effect, they clearly are not entitled to the judgment to such effect which they seek in this proceeding.[2]

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[2] After the government filed its petition for mandamus on March 11, 1958, and five days after the response to such petition was originally due, the petitioners filed a motion in the District Court on April 4, 1958, requesting relabeling. By this action, they attempted to bring themselves within the holding of the *Buticaps* case, the decision in which was rendered on January 30, 1958. No decision was ever rendered on the motion to relabel, and it has been made moot by the Court of Appeals' action in directing destruction. As this Court held in *Ackermann* v. *United States*, 340

The action of the Court of Appeals in this case is in accord with that directed by this Court and other courts of appeals. In *United States* v. *Urbuteit*, 336 U.S. 804, reversing *Urbeteit* v. *United States*, 172 F. 2d 386 (C.A. 5), the device was alleged to have been misbranded because of both false diagnostic and false curative claims. The Court of Appeals reversed a judgment of condemnation and destruction on the grounds that certain literature shipped separately from the devices was not labeling, and also because the court refused to admit in evidence certain testimony for the claimant concerning the curative effect of the device. See, *Urbeteit* v. *United States*, 164 F. 2d 245 (C.A. 5). On certiorari, this Court reversed the holding concerning labeling, but upheld the ruling concerning the admission of evidence. The case was remanded to the Court of Appeals to determine whether, despite the erroneous exclusion of evidence as to the curative properties of the machine, the evidence of misbranding as to the diagnostic capabilities was alone sufficient to sustain the decree of condemnation and destruction. *United States* v. *Urbuteit*, 335 U.S. 355. On remand, the Court of Appeals sent the case back to the District Court to take further evidence, without resolving the question as to whether the evidence was sufficient on the one misbranding charge to justify the decree. *Urbeteit* v. *United States*, 172 F. 2d 386. Again certiorari was granted, and the Court of Appeals was reversed. The Court stated, *per curiam*, in *United States* v. *Urbuteit*, 336 U.S. 804, 806:

> When the case was here before * * * we did leave to the Court of Appeals for consideration a further

U. S. 193, 198, the fact that an intervening opinion may change pre-existing concepts concerning the law is not a sufficient reason to relieve parties to a lawsuit of conscious and deliberate choices.

question—whether the evidence as respects the falsity of the representations regarding the diagnostic capabilities of the machines was adequate to sustain the condemnation even though error in exclusion of the other evidence were conceded. The United States is entitled to a hearing on that question.

On remand, the Court of Appeals affirmed the lower court's judgment, thus sustaining the condemnation decree on the one charge of misbranding proved by the undisputed evidence. *Urbetcit* v. *United States*, 176 F. 2d 438 (C.A. 5), certiorari denied, 338 U.S. 947.

The Courts of Appeals in other circuits have taken similar action. See *Goodwin* v. *United States*, 2 F. 2d 200, 201 (C.A. 6); *United States* v. *62 Packages* * * * *Marmola*, 142 F. 2d 107, 111 (C.A. 7), certiorari denied, 323 U.S. 731; *United States* v. *Six Dozen Bottles* * * * *Kuriko*, 158 F. 2d 667, 669-670 (C.A. 7); and *United States* v. *One Device* * * * *Colonic Irrigator*, 160 F. 2d 194, 200 (C.A. 10).

2. The District Court's ruling limiting costs to those attributable to the Section 403(j) charge was based on its theory that there was a valid finding in petitioners' favor on the misleading claims charge. Since this premise was found to be untenable, the Court of Appeals properly found that the limitation of costs based thereon was improper.

There is no conflict with *United States* v. *Arizona Canning Company*, 212 F. 2d 532 (C.A. 10). The instant action of the Court of Appeals applies the same reasoning as that which underlies that opinion. There, the court vacated the District Court's judgment which limited costs on the erroneous theory that Rule 45(e)

(1) of the Federal Rules of Civil Procedure restricted the taxation of travel costs to travel within 100 miles from the place of trial. The court held that since the trial court erroneously thought itself bound by that rule in taxing costs, such limitation of the costs should be vacated. Here, the trial judge limited costs on the theory that claimants were entitled to judgment in their favor on the false and misleading charges. The Court of Appeals directed him to strike from the decree the limitation based upon this error.

As concerns costs, the Court of Appeals did not attempt to determine what specific costs should be taxed. That was left to the District Court, just as it was in *United States* v. *Arizona Canning Company, supra*, 212 F. 2d 532. However, the District Court was told that it abused its discretion in basing the denial of costs on the verdict which had been nullified.

This Court has held in *City Bank of Fort Worth* v. *Hunter*, 152 U.S. 512, that the award of costs on a theory inconsistent with the mandate of a reviewing court is properly corrected by mandamus. The Court of Appeals here has properly exercised its jurisdiction to correct such action.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

WILLIAM W. GOODRICH,
Assistant General Counsel,

PAUL M. STEFFY,
Attorney,

Department of Health, Education, and Welfare.

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No. 249.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

H. B. McFARLING, JOHN G. SCOTT, and MOUNTAIN VALLEY SALES CO., a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

EDWARD L. WRIGHT,
1025 Pyramid Building,
Little Rock, Arkansas,
ROBERT E. SCHLAFLY,
314 North Broadway,
St. Louis, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street CEntral 1-4477.

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REPLY BRIEF FOR PETITIONERS.

The government's argument in opposition to the petition relies on an assertion of error in the instructions to deprive the verdict of validity. This assertion is unfounded and warrants a reply.

1. The Status of the Verdict.

The primary question is whether the reversal of the District Court judgment, on the separate charge of failure to comply with the dietary use regulations, nullifies the jury

verdict in favor of petitioners on the charge of misleading claims. The government's position, as stated in its brief, is that the Court of Appeals found an error in the labeling instruction which vitiated the jury verdict in its entirety. Consequently, it argues that the verdict in favor of petitioners on the charge of misleading claims is without validity, and that there has not been a valid adjudication of the charge of misleading claims.

Thus, the government does not rely on the established violation of Section 403 (j) as eliminating the verdict on the other issues submitted to the jury. It depends solely on an alleged error in the instructions to support the action taken by the Court of Appeals in nullifying the entire verdict. That position is demonstrably wrong.

The Verdict on Four Pamphlets Was Not Affected by Labeling Instructions.

Eight pamphlets were in evidence (Appendix C to petition, p. 29). The government must concede that the instruction in question—submitting the issue of labeling to the jury—did not apply to the four pamphlets which claimants, at the trial, admitted were labeling. (These four pamphlets contained the basic claims admittedly made for the product.) There was no instruction error invalidating the jury verdict on those four pamphlets, because the jury was instructed that they were labeling. See Instruction No. 5 set forth in R. Item 12, p. 299.

The impossibility of error, or confusion of the jury, in this respect is emphasized by the fact that the jury was given the eight pamphlets when it retired for deliberation. (See R. Item 12, pp. 304, 306.) Later, the jury asked, and was given, the specific titles and exhibit numbers of the four pamphlets which were admitted to be labeling and of the other four pamphlets which were denied to be labeling. (See R. Item 12, pp. 322-323.)

Even if the government were right in its contention that it was error to submit the issue of labeling to the jury, such error would apply only to the four pamphlets to which the labeling instruction was directed. The claimed error could not have affected the verdict on the four pamphlets which were conceded to be labeling, as the only question for the jury to decide as to them was whether the representations they contained were misleading. The verdict that the representations contained in those four pamphlets were not misleading is, therefore, free from any taint of error.

The elimination of the jury verdict on the misleading claims charge is supported by the government solely on the theory that an erroneous instruction on labeling vitiated the entire verdict. This theory must fail with respect to the four pamphlets which were admitted to be labeling, and which the trial court instructed the jury were labeling. These four pamphlets were outside the scope of the instruction now challenged by the government, because that instruction submitted the issue of labeling only with respect to the four other pamphlets, which the claimants denied were labeling. The government suggests no other basis for supporting the action of the Court of Appeals in nullifying the verdict with respect to the four pamphlets admitted to be labeling; and the government ignores the fact that the jury was instructed that these pamphlets were labeling (R. Item 12, p. 299).

The cases cited in the brief for the government (pp. 7-8) are not analogous in fact or in principle. None of them involved a jury verdict in favor of the claimant on one or more issues, so that the question of the effect of reversal on a separable ground did not arise. There was no jury in **United States v. Urbuteit** and the trial court entered judgment for the libelant on all issues. Similarly, no jury verdict was involved in **United States v. 62 Packages**. **Mar-**

mola and **United States v. One Device . . . Colonic Irrigator.** In **United States v. Six Dozen Bottles . . . Kuriko** and in **Goodwin v. United States** (under the 1906 Act), there were jury verdicts in favor of the government, which were affirmed on appeal.

These cases are beside the point, for they stand only for the proposition that a single finding of misbranding is sufficient to sustain a condemnation. That does not reach the question presented by this case, which is whether a judgment of violation of one section of the Act nullifies a jury verdict that other sections were not violated. The Court of Appeals held, contrary to the the Seventh Amendment, that the jury verdict that Sections 403 (a) and 502 (a) were not violated, "disappeared from the case". (Appendix A to petition, p. 17).

2. Costs in the District Court.

The government tacitly concedes that the District Court retains discretion in the allowance of costs under the statute. The error of the Court of Appeals in holding otherwise is exposed by this statement in the brief for the government (p. 9):

> "However, the District Court was told that it abused its discretion in basing the denial of costs on the verdict which had been nullified."

The fact is that the challenged order of the Court of Appeals does not tell the District Court that it has any discretion in the matter of costs. It implies the contrary (Appendices A, B to the petition, pp. 15, 19). The petition for rehearing in the Court of Appeals (R. Item 9, pp. 2-3) asked the court to leave the question of costs to the discretion of the District Court. The Court of Appeals denied this request without comment or explanation. (See R. Item 10.)

The fallacy of the government's position is its assumption that all costs must be assessed against the claimants unless they obtain a favorable verdict. If, as we contend, the District Court retains discretion in the matter, it is appropriate to deny costs related to the trial of those charges which the government failed to prove. The abandonment of irresponsible charges, or the failure to prove them, warrants an exercise of discretion on costs. In any event, the District Court cannot be precluded from exercising that discretion, although the effect of the Court of Appeals' order is to prevent it.

Conclusion.

For the foregoing reasons, and as set forth in the petition, we submit that the petition for a writ of certiorari should be granted.

EDWARD L. WRIGHT,
ROBERT F. SCHLAFLY,
Attorneys for Petitioners.

September, 1958.